

PRIVILEGED AND CONFIDENTIAL
ATTORNEY/CLIENT COMMUNICATIONS

RECEIVED
MAY 5 1988
GEORGE L. KNOK

REPORTERS: Allen R. Purvis
Janet L. Johnson

TRIAL REPORT
SUMMARY/TESTIMONY/PROJECTION

CASE NAME: Cipollone DATE: 04-May-88 p.m. PAGE 1 OF 4

SUMMARY:

Kearney continued his direct examination of Dr. Kensler when court reconvened at 2:15 p.m. Kensler described various research ADL performed for Liggett; the disclosure of research results; and the 1963 submission to the Surgeon General. The jury was excused at 4:20 to enable Sarokin to hear argument on Edell's objections to Kensler's testimony regarding the formation of the Tobacco Working Group (Edell claims such testimony is preempted).

At the conclusion of this argument, Sarokin again inquired as to when defense counsel expected to complete their case and Bleakley advised that the defense was hopeful that it would complete its case by the middle of the week of May 16. Edell advised that rebuttal was "likely but would not be lengthy." Sarokin urged the parties to complete the evidence by May 20 so counsel and the court could spend a day or two resolving issues and hopefully present the case to the jury by May 25 or 26.

WITNESS: Dr. Charles J. Kensler

IDENTITY: Former A.D. Little Scientist

EXAMINER: DIRECT: James Kearney TIME: 1 hrs. 55 min.

TESTIMONY:

Kensler resumed his direct testimony by explaining that Liggett, like other ADL clients, required the company and the researchers to enter into a confidentiality agreement so that any commercially important findings from the research would be protected. Kensler insisted on an exception to the confidentiality restrictions with Liggett in order to be able to tell Wynder and others about the results of his research. Kensler admitted that he did not ask Liggett for permission to disclose the inhalation work done by ADL because he did not find it necessary in light of the negative results. He also found no reason to publish much of ADL's follow-up work because others had already published similar results and there was no need for a "me too" article that would take up valuable publication space. Kensler suggested that some

2025880547

lawyers for Liggett may have disagreed with his desire to disclose the results of ADL's testing but Liggett management always gave permission when asked.

Over the years, ADL did the biological work for Liggett while in-house scientists did the chemical work. Kensler described the early smoke fractionation work done by ADL and pointed out that it was very difficult to do this work in the early days because of an absence of sophisticated equipment. ADL studied the existence of polycyclic aromatic hydrocarbons in cigarette smoke but their research never identified any significant compounds that had not already been identified and published in the literature. He noted that Mold had identified a compound related to a pesticide used in tobacco and Liggett management allowed him to publish his results. All of ADL's work on smoke fractionation was included in its summation to the Surgeon General.

With respect to ADL's research on BAP, Kensler noted that their tests showed no dose response relationship in mice. Kensler described how Dr. Cornelius Rhoades, an independent scientist, noted the fact that BAP seemed to be biologically active in mice but not monkeys so he applied it in high concentrations to the back of his own body to see if there was any sebaceous gland suppression, but there was not. Kensler also referred to the "roofer's studies" which showed that roofers who inhaled hot tar fumes which contained high concentrates of BAP did not experience a higher incidence of lung cancer.

Kensler described how he was contacted by Dr. Fizer, who was a member of the Surgeon General's Committee, asked if Kensler would tell the committee what he knew. Liggett consented and Kensler described how he was "disappointed" that the SG's Committee wanted a written submission because that involved a lot of work. He had simply hoped to be able to sit down with the committee and spend some talking about the results of ADL's work. Nevertheless, he and Bates prepared the nine volume submission for the Surgeon General.

In addition to reporting all of the ciliary, inhalation, mouse skin-painting and smoke fractionation work, the SG submission also referred to the work done to-date on additives and/or catalysts. Kensler said "In 1956 when we saw we were going to duplicate Wynder's results, I said we needed to do things to reduce the biological activity on the test system we were using then -- mouse backs."

Kensler also explained that he was invited to make an oral presentation to the Surgeon General's Committee in May, 1963. The presentation lasted approximately one-half day and there were no lawyers present. As a result of that presentation, he received a glowing letter of thanks and appreciation from Hundley of the Surgeon General's Committee and this was introduced into evidence. When Kearney asked if there was anything in Liggett's submission

2025880548

to the Surgeon General that Kensler thought was untrue or inaccurate, he replied "Of course not." Kensler acknowledged that lawyers reviewed the submission but made no substantial changes. According to Kensler, Mold and Bates were "delighted" with the submission.

With respect to the confidentiality limitations Liggett placed on the Surgeon General's submission, Kensler again explained that the company was concerned about possibly revealing commercially advantageous research. He noted that any scientist who wanted to review the submission could do so by going to ADL or Liggett's headquarters and several scientists did receive permission to review the submission. Kensler noted that the Liggett submission is referred to several times in the 1964 SG Report and he was even provided with advanced copies of the draft of the report in order to make any changes to those portions referring to Liggett's submission.

Kearney next directed Kensler's attention to the "multiple choice" document (the ADL memo which stated that there were biologically active compounds in cigarette smoke which were cancer causing, cancer promoting, poisonous, pleasurable and stimulating). Kensler described how this paper was prepared by a staff chemist who had not been involved in any of ADL's mouse skin-painting work. Kensler insisted that ADL never made any findings that cigarette smoke has biologically active components which cause cancer in humans and therefore never made such a statement to Liggett.

As Kearney turned Kensler's attention to the formation of the Tobacco Working Group (representatives of NCI, the tobacco industry and other interested parties), Edell objected and a lengthy sidebar resulted. At 4:20 p.m., the jury was excused and Sarokin heard additional argument on Edell's objection that this testimony was preempted. Kearney argued that TWG discounted the importance of mouse skin-painting and this was a significant criticism by governmental officials of one of the primary bases supporting general causation. Kearney expressed his desire to make this point but Kearney was reluctant to enter this area because it arises in the context of Liggett's work on the palladium cigarette. Sarokin continues to express his view that mouse skin-painting is relevant because plaintiff can argue that Liggett relied on test results from mouse skin-painting in order to get its patent for the palladium cigarette. Kearney is considering whether to pursue this line of questioning.

ASSESSMENT:

Kensler continues to hold the jury's attention as he explains events and concepts that the jury heard about during Harris' testimony. They seem interested in his "insider's view" but it is difficult to determine how they are receiving the evidence. Kensler continues to be confused at times by objections and rephrased questions. After a lengthy explanation about ADL's BAP test,

2025880549

Edell's objection as "not responsive" was sustained and Kensler was directed not to explain. He looked perplexed and then turned to the jury and said "we did what I just described to you -- but I won't do that again" and the jury smiled. Kensler seemed more comfortable this afternoon and presents his testimony in a matter of fact manner.

PROJECTION:

Kensler's direct should finish early in the morning. Kearney advised the court that Liggett has decided not to call Bryant, at least at this time, so Spears will follow Kensler. Osdene, Philip Morris' Research Director, may be called to follow Spears.

Monday, May 9 -- Judge Sarokin's motion day -- no Cipollone trial. No report will be transmitted.

Friday, May 13 -- Court will not be in session; reason unknown. No report will be transmitted.

Monday, May 16 -- Court will not be in session; reason unknown. No report will be transmitted.

Monday, May 23 -- Judge Sarokin's motion day -- no Cipollone trial. No report will be transmitted.

Monday, May 30 -- Court holiday -- Memorial Day. No report will be transmitted.

2025880550